

**IN THE HIGH COURT OF ZIMBABWE
HELD AT HARARE**

CASE NO HC _____/19

In the matter between:

ROBIN VELA

APPLICANT

And

THE AUDITOR GENERAL OF ZIMBABWE N.O

1ST RESPONDENT

And

BDO ZIMBABWE CHARTERED ACCOUNTANTS

2ND RESPONDENT

(a firm of Accountants whose partners are Ngoni Kudenga, Gladman Sabarauta, Martin Makaya, Gilbert Gwatiringa, and Jonas Jonga)

founding affidavit

(a) The deposition and parties

I, **ROBIN VELA**, make oath and state as follows;

- 1.1 I am an adult male and applicant in this matter. The facts that I depose to are unless otherwise stated known to me and are true and correct. Where I relate to legal propositions, I do so on counsel's advice with the understanding that all the legal issues raised will be canvassed in argument, both written and oral. The legal questions that arise have, however, been explained to my satisfaction.
- 1.2 My address for service for the purposes of these proceedings is care of **RUBAYA AND CHATAMBUDZA Legal Practitioners** of 57 Churchill Avenue, Alexandra Park, Harare.
- 1.3 First respondent is the **AUDITOR GENERAL OF ZIMBABWE** appointed in terms of section 310 of the Constitution of Zimbabwe, 2013 and who operates under and in terms of the Audit Office Act (Chapter 22:18). She is cited in her official capacity.
- 1.4 Second respondent is a firm of Accountants **BDO ZIMBABWE CHARTERED ACCOUNTANTS** whose partners are Ngoni Kudenga, Gladman Sabarauta, Martin

Makaya, Gilbert Gwatiringa and Jonas Jonga. Second respondent's address for service is at Kudenga House, 3 Baines Avenue, Harare. I do not know whether the firm is registered in terms of the Public Accountants and Auditors Act (Chapter 27:12).

(b) **The jurisdictional question**

1.5 Section 309(2) of the Constitution of Zimbabwe, 2013 sets out the functions of the first respondent as follows;

“(2) The functions of the Auditor-General are —

(a) to audit the accounts, financial systems and financial management of all departments, institutions and agencies of government, all provincial and metropolitan councils and all local authorities;

(b) at the request of the Government, to carry out special audits of the accounts of any statutory body or government-controlled entity;

(c) to order the taking of measures to rectify any defects in the management and safeguarding of public funds and public property; and

(d) to exercise any other functions that may be conferred or imposed on him or her by or under an Act of Parliament”

1.6 It is common cause that the National Social Security Authority (NSSA) falls under this audit jurisdiction of the first respondent. This is also the case in terms of section 5(2) of the Audit Office Act (Audit Act).

1.7 By section 8(1) of the Audit Act, first respondent can act through authorised representatives. In that regard, section 9 of the Act specifically provides as follows;

“(1) The Auditor-General may, by notice in the Gazette, appoint a person registered as a public auditor in terms of the Public Accountants and Auditors Act [Chapter 27:12] to inspect, examine and audit the accounts, records or stores that are required by this Act or by any other enactment, to be inspected, examined or audited by the Auditor-General and report the results of the inspection, examination or audit.

(2) The person appointed in terms of subsection (1) may carry out an economy, efficiency and effectiveness audit of the operations, or specified operations, of a designated statutory body, and report the results of the audit to the Auditor-General”

1.8 It is on the basis of this provision that second respondent was on the 28th of February 2018 appointed by first respondent to carry out a forensic investigation of the affairs of NSSA for the period 1 January 2015 to 28 February 2018.

1.9 I am advised that in carrying out the forensic investigation as a delegate of the first respondent, second respondent was by that fact exercising public power. The manner in which it conducted the investigation and the conclusions it arrived at is accordingly liable to judicial review at the instance of an aggrieved party of whom I am.

(c) **The nature of the application**

2.1 This is an application brought in terms of section 3(1)(a) as read together with section 4 of the Administrative Justice Act (Chapter 10:28) (AJA). The application remains at all times inspired by section 68(1) of the Constitution of Zimbabwe 2013, which I have

not invoked in the first instance by reason of the twin doctrines of subsidiarity and constitutional avoidance.

2.2 It is my contention that the Audit report which I seek to impugn is without jurisdiction, irregular, unreasonable, incompetent, biased, malicious and unfair in a manner which violates section 3(1)(a) of the AJA.

2.3 In the alternative and to the extent that it becomes necessary, I seek to invoke this court's review powers as set out under sections 26 and 27 of the High Court Act as well as the common law. The grounds upon which that invocation is sought are the same as those already referred to above.

(d) **The background issues**

2.4 From 12 July 2015 to 27 March 2018, I was the board chairman of NSSA. It is my submission that during that period I conducted myself with honour, zeal, dignity, distinction and patriotism. I am proud of the work that I did to turn around an institution of national significance that had been failing to meet its mandate.

2.5 I am a professionally qualified and experienced Investment Banker; and Fellow of both the Institute of Chartered Accountants in England and Wales ("ICAEW") and the UK Chartered Securities Institute. In 2016, I was appointed to the ICAEW Member's Advisory Board for Africa, a position I resigned from in July 2018.

I am also a member of the Institute of Directors in Southern Africa and the past Patron for the African Institute of Petroleum. I was also a former appointed consultant to the World Bank, IFC and Sanlam Investment Managers in Swaziland.

I have founded and led a Johannesburg & London Stock Exchange (AIM List) listed entity; co-founded two separate UK equity investment funds and worked for top tier bulge bracket financial institutions in the City of London as a senior private equity/ investment banking executive for more than a decade. I have a verifiable track record of leading and closing corporate and investment related transactions in Sub-Saharan Africa and the City of London.

I have held numerous public, listed company and private company directorships. I graduated with a Bachelor of Science (honours) degree in Economics and Accounting from Bristol University.

I was named the overall winner of the "Megafeast Outstanding Top 20 Men of the Year 2017 Special Recognition in Professional Approach to Business Award" in Zimbabwe for 2017, I am an acclaimed international business person, experienced in a vast array of economic activities and it is for that reason that I was appointed chairperson of NSSA. The corporation accordingly enjoyed a new lease of life and exponential growth under my stewardship with massive increases in net asset value, investment income, cashflow and profitability as can be objectively verified from the annual reports audited by the first respondent for the financial years 2016 and 2017.

2.6 After I was relieved of my position, on 27 March 2018, the first respondent in response to a request from the then Minister of Public Service, Labour and Social Welfare, Petronella Kagonye, appointed second respondent to investigate the affairs of NSSA.

- 2.7 As I have already indicated, I do not know whether the second respondent is registered in terms of the Public Accountants and Auditors Act. The work that it conducted suggests that it is not. I will account for that hard stated position herein.
- 2.8 I am, however, aware that this was the first big public and high profile mandate of the second respondent. Regrettably, the second respondent seems to have been excitable and overwhelmed by the task it had to undertake. It also seems to have been too eager to impress and too eager it was, it did not consider it important to be governed by its professional values and ethics in conducting the investigation.
- 2.9 The investigation yielded a report which I attach hereto and mark as "A". I am aggrieved by this report and by its conclusions. I am also aggrieved by the manner in which the investigation was conducted. My objections have long been recorded.
- 3.1 I received this report, as circulated in the wide public domain, on Friday 2 August 2019 and have not wasted anytime in challenging it.

(e) **The process**

- 3.2 The first time that I became aware that I was being investigated was on Friday 9 November 2018, when I received a call from Ms Primrose Mhembere, the personal assistant to the second respondent's managing partner, Ngoni Kudenga (Kudenga).
- 3.3 Subsequently, a questionnaire was given to me which I attach hereto and mark as "B". The following is apparent from the introductory paragraphs of annexure "B";
- i. I made it clear that my responses were to be read together with a rebuttal Dossier dated 11 May 2018. The Dossier is attached hereto and marked as "C".
 - ii. That the Housing Transactions supplement dated 16 July 2018 also had to be considered. I attach it hereto and mark same as "D".
 - iii. That the auditors also had to consider the Housing Transactions annexures dated 16 July 2018 which are attached hereto and marked as "E series".
 - iv. I also made it clear that I had already picked some whispers in the local business community suggesting that there was already a draft report prepared even before my responses to the questionnaire was considered. I wondered whether the auditors already had conclusions and were just going through the motions as a window dressing measure.
 - v. I also queried the accusatorial and in certain instances judgmental tone of the questions put to me. I noted that the auditors seemed to have approached the matter with shut minds and were seeking the confirmation of a view that had been held, crystallized and turned into a conclusion.
 - vi. In view of these concerns, I specifically reserved my rights. Not having anything to hide though, I set about assisting the auditors to the best of my knowledge.
- 3.4 These concerns were neither acknowledged nor addressed. I was altogether ignored as is evident for a simple perusal of my responses to the questionnaire and the report's

write up and findings. I attached hereto and marked as “**F1**” confirmation that BDO received the dossiers and questionnaire.

- 3.5 The court will note upon going through the report that it does not make use of or make any reference to my answers. I am completely ignored though I am mercilessly condemned.

(f) **The scope of the audit**

- 3.6 The forensic audit covers the following areas, (and this is limited to those issues that pertain to me);

Investments

- i. The auditors were required to establish whether there were any related party transactions as well as any out of the ordinary transactions during the review period.
- ii. Establish if investments done with Metbank were above board.
- iii. Whether there was proper securitization of certain off-take agreements.

Human resources

- iv. Whether, certain senior employees had been properly recruited by NSSA.
- v. To establish whether the remuneration policy then in operation had been properly authorised.

Any other issues

- vi. The auditors also had carte blanche to deal with any other issues.

(g) **The conclusions reached by the auditors**

- 3.7 The conclusions reached by the auditors on the issues material to this challenge are the following;

- i. The auditors concluded that the Metbank investments were not above board and had yielded certain losses to NSSA.
- ii. It was also concluded that the off-take agreements were irregular and has resulted in losses to NSSA.
- iii. Further condemned was the agreement between NSSA and HCZ. The conclusion was specifically arrived at that I had been the proximate cause of the conclusion of that agreement.
- iv. The auditors also concluded that the manner in which the interviews for those recruited into senior management had been was shrouded in mystery and hidden under a cloud of unaccountability.
- v. It was also the view of the auditors that I had interfered in management issues.
- vi. The approval of Board Fees by the Permanent Secretary was also blamed on me. On that issue the auditors wrote with no subtlety;

“NSSA should seek legal counsel on how to deal with the involvement of the former Board Chairman in overpayment of board fees”

(h) **The effect**

3.8 There is no doubt that the conclusion casts me in bad light and alleges all sorts of improprieties against me. It affects my good name, my economic interests both locally and abroad and has been a source of great consternation. The fact that the audit report has the Auditor General’s stamp, having been carried out at her bidding, formalises and gives public character to the attack against my person. The stain being unearned must be washed off.

3.9 It is in that context that I raise certain pertinent contentions against the report, its processes and conclusions.

(i) **The grounds for the challenge**

4.1 The grounds upon which I challenge the report are many. I turn to them:

(i) **Beyond the remit of powers**

4.2 I submit that in contracting the second respondent to audit all the issues on which it has now given an opinion, the first respondent went beyond the remit of her powers.

4.3 First respondent’s constitutional function is to audit accounts, financial systems and financial management of public bodies and institutions. It is that function that first respondent can delegate to the second respondent. Any other audit that goes beyond the audit of accounts, financial systems and financial management of public bodies and institutions is unlawful. That at any rate is how the Audit Office Act is to be construed, particularly section 9(2) thereof, in view of provisions of paragraph 10 of the sixth schedule to the constitution of Zimbabwe as read together with section 2(1) of the same constitution.

4.4 The audit carried out by the second respondent goes beyond the constitutional remit. The scope of the audit makes that fundamentally clear and the findings arrived at puts that beyond any doubt.

4.5 The whole audit process was consequently unlawful and nothing can depend on it. For the comfort of the parties, its invalidity must be decreed.

(ii) **The report does not constitute a forensic report**

4.6 Public power cannot be exercised for a purpose other than that for which it has been given. The Auditor General in fulfilment of a constitutional mandate decided that a forensic investigation had to be carried out on the affairs of NSSA. The report impugned simply does not constitute a forensic investigation.

4.7 The partner who signed off the report and none of the persons who worked on it are qualified or accredited as Forensic Investigators by any institution, reputable or otherwise and could not have carried out a forensic investigation. I attach hereto and mark as “**F2** series” an investigation conducted with the necessary reputable

organisations with whom the second respondent would otherwise have been registered had it had in its midst Forensic Investigators.

- 4.8 I am advised by counsel that something cannot be put on nothing neither can a valid act arise out of the execution of duty by an unqualified person. To the extent that the persons who conducted this investigation, signed off the report and passed it to the Auditor General are not qualified, no validity could attach to their efforts.
- 4.9 In similar vein, the Auditor General could not have properly relied on an invalid report as that would be breach of both the constitution and statute.
- 5.1 Further, the manner in which the report was prepared and compiled shows a worrisome lack of capacity to conduct the task for which second respondent was contracted. I will relate to the incompetence that afflicts the report. Suffice to state at this stage, that such incompetence reflects on the lack of basic qualifications and the depth needed for such a task.
- 5.2 For this reason, the report may be reviewed and set aside. A declaration as to its invalidity may precede such review.

(iii) **The report is incompetent**

- 5.3 The manner in which the investigators went about executing their task speaks to their incompetency which incompetency affects the outcome of the report. I will highlight a few issues which support that contention.
- i. The report deals with Board Fees expenses which I am accused of having unlawfully effected. An arbitrary calculated board fees quarterly retainer figure for the Board Chairman of USD\$4,988 is given and yet the approved figure was an accurate sum amount of USD\$6,450 for the Board Chairman. The question arises as to why someone would choose to work on a percentage error when the actual sum is available.
 - ii. I must point out that when this issue was raised with me, I provided the approval form sent showing the actual numbers. This is what the Permanent Secretary approved. This is what the report must relate to. It does not. Instead the second respondent imputes his own numbers. As if to further demonstrate the complete incompetence of the second respondent, a 50% increase of the Board Chairman's retainer of USD\$3,225 would give an amount of USD\$4,837.50 and NOT the arbitrary calculated amount of USD\$4,988. This in a forensic report of consequent is unacceptable.
 - iii. Further, the report suggests, and without a basis, that these board fees were not approved. This is clearly contrary to the evidence that was placed before the auditors. No explanation for the rejection of the position I set out is given. This is incompetent.
 - iv. This is an emotive and significant issue in the context of the report in that it speaks to what I am also supposed to have been paid. The incompetence that pervades the report is however, stark.
- 5.4 The report deals with the Africom issue and gives a deemed actual loss to NSSA of USD\$303,140 which is incorrect. In fact the transaction NSSA undertook with ZAMCO and the Ministry of Defence resulted a profit restatement of USD\$15.5 million to NSSA. Not recognising this is incompetent.

- i. Prior to my tenure as Board Chairman, and as acknowledged in the report, NSSA had provided an unconditional guarantee to pay DFIs in hard currency in the amount of USD\$15.8 million. The effect was a liability on NSSA's balance sheet, the settlement of an effective USD\$303,104, getting ZAMCO to take over the guarantee and the Ministry of Defence to pay some USD\$300,000 effectively meant this was a saving and return to balance sheet of NSSA of USD\$15.5 million. This inconvenient truth is ignored.
 - ii. It is with respect shocking incompetence that an Accountancy Firm signs off on a report but cannot determine the difference between an asset and a liability. This is inexcusable and yet a taint has been put on my person on the basis of such incompetence.
- 5.5 Yet another aspect of the incompetency of the report relates to the so called calculation of the potential loss suffered by NSSA on the Housing Corporation of Zimbabwe (HCZ) issue of which an arbitrary figure of USD\$104 million is given. The number is given on the incompetent assumption that the HCZ houses, once completed, would have no takers at the given price and were the same as the National Building Society (NBS) houses which the auditors thought were comparable.
- i. The auditors would not have proceeded on this erroneous assumption had they given effect to my right to be heard. A full dossier of documents, including a voluminous information memorandum from HCZ, already attached, was provided on the issue and dealt with these concerns. Shockingly, the auditors do not show why that dossier could be rejected or why they thought it otherwise didn't provide answers to the issues on which a conclusion was made.
 - ii. The USD\$104 million loss is arbitrary and has no basis in fact, accounting and or in law. I point out that for Caledonia there was and remains extensive demand and full uptake from civil servants and trade unions of all its houses. I challenge the second respondent to bring evidence to the contrary. I also point out for what it is worth that these houses are markedly different from the NBS shell houses which the auditors treated as comparable to the HCZ houses that came furnished, fully appliance equipped and painted. Such key differences are not noted by a firm purportedly conducting a forensic audit.
- 5.4 Further, it is an objective fact that HCZ obtained judgment on 22 February 2019 against NSSA. That judgment is attached hereto and marked as "**G1**". The judgment speaks to the issues on which the auditors provided a negative comment and shows that no basis for such a negative conclusion exists.
- i. In clear abdication of their duties, the auditors proceeded to release their report on the 4th of March 2019 without considering the judgment that had been rendered by the High Court on the matter. I pause to put forward the following charges, these circumstances considered;
 - a. It is most regrettable that the second respondent does not understand the position of the High Court and the authority it yields over mortal disputation. The auditors clearly do not understand that the court's judgment on these issues affects their conclusions. If they did, they would have deferred to its authority.

Such level of incompetence is with respect crass and constitutes an abdication of function.

- b. Second, it shows that the auditors went about their work in a most malicious manner. Indeed one can be forgiven for taking the view that they arrived at conclusions before investigating the matter and thereafter set about validating those conclusions. That would explain the tone of the questions they put to me in the questionnaire. The bottom line is that they found the judgment of the High Court to be an inconvenience. In pursuit of an opaque agenda, they ignored its authority.
 - ii. The Arbitration award granted in favour of HCZ, further contradicts the second respondents position. The report was, however, never updated to reflect these two key judgements in favour of HCZ which are fundamental to the report's contention. This is incompetent at best but more likely malicious in that the judgments were not convenient to the second respondent's narrative. The arbitration award is attached as "G2"
 - iii. The auditors also fail to identify a single meeting in which I attended with NSSA management and HCZ representatives. They do not because it never happened. Instead NSSA management was given a free hand to engage with HCZ representation, to reach agreement, to enter into contract, to conduct whatever work they wished prior to so doing. Infact NSSA Management proceeded to contract and further engage with HCZ without the NSSA Board or me.
 - iv. The auditors put out a false narrative that HCZ, a week old company obtained a US\$304 million contract without tender. Infact Housing Africa Corporation, the holding company for HCZ, first approached NSSA in February 2017 with an information memorandum. This memorandum was then passed on to NSSA management to work through. It was only on 30 June 2017 that NSSA Board approved engagement with HAC, Having approved the concept, and following discussions with NSSA management, HAC incorporated HCZ as the special purpose vehicle for its Zimbabwean housing projects. Nothing is untoward and this is infact the standard and norm in any jurisdiction. It was in late July 2017/ early August 2017 that the contract was entered into on a phased basis and infact for 2000 houses in the first phase. The auditors non-descript explanation is designed to give a false and alarmist impression but which is patently false and unwarranted. It took HAC/HCZ a minimum 6 months to get to contract with NSSA.
- 5.5 For the reasons articulated above, the report cannot stand. The witch hunt that characterises it requires a review.
- (iv) **The auditors were biased**
- 5.6 As they were obliged to do, the auditors provided a questionnaire which put to me certain pointed, though biased questions. As I have already indicated, I objected and did at the same time take issue with the manner in which the questions were framed and the premise from which they proceeded.

- 5.7 Basic notions of justice and decency obliged the auditors to have considered my position. They were obliged to either agree or disagree with it. In the event that they decided to disagree with me, a basis for so disagreeing had to be articulated.
- 5.8 The responses that I gave were however, altogether ignored. The explanations that I tendered were not followed through neither are they made reference to.
- 5.9 In the same vein, I provided three dossiers. These were also ignored. The pertinent answers that are set out in those dossiers did not receive the attention of the auditors neither did they exercise their minds. The auditors do not show why they considered that those documents were useless.
- 6.1 I can only surmise that my responses were ignored for no other reason than that they did not tally with the script. That the auditors were working with a script is to begin with unfortunate. What, however, cannot be got over is that the entire process is clearly stained, is compromised and can have no validity either in law or in morals. The fact that this is an exercise of public power makes it worse.
- 6.2 I want to specifically point out that in my responses and dossiers I provided sufficient evidence which showed that:
- i. The projects on which improprieties have been raised had full and informed board approval. Collective responsibility was taken by the board and minuted.
 - ii. There are full and credible minutes (as well as email correspondence) which totally make nonsense of the allegation that management had anything other than a free hand to carry out their duties. Indeed this was put to management explicitly and repeatedly.
 - iii. There is sufficient evidence showing that the offtake arrangement was conceived, designed and put in place by management. There was and remains nothing untoward in relation to the housing offtake agreements undertaken by NSSA because that remains a NSSA policy not my individual policy. Ironically, this is confirmed by the same auditors on page 70 of their own report.
 - iv. That the response of the board to all the issues raised is collective and that accordingly, an attempt to single me out, pillory and raise improprieties against me is most unfortunate.
- 6.3 This with respect shows that there was something in my responses which would have affected the conclusions reached. I ought to have been heard through the consideration of my responses. The right to be heard had reverberated in all processes throughout all history, counselling us at all times of the dangers of considering one side to the matter and of making decisions without considering both sides to an issue. This precept of divine justice and judgment was negated with abandon in this matter. The process cannot stand.
- 6.4 Further, it is a matter of public record that Ngoni Kudenga, second respondent's Managing Partner was publicly attacked as owing me some money and being biased in my favour by a member of the House of Assembly. That these allegations put Kudenga under immense pressure does not require esoteric quackery to appreciate.

Unconsciously, Kudenga must have tried to make a point by showing that he was unbiased and ended up being biased in the process against me.

- 6.5 I point out that the seriousness of the allegations made against Kudenga demanded of him an immediate recusal from handling the matter. He did not. Counsel has advised me, on the basis of a welter of judicial authorities, that everything that Kudenga did beyond the point at which he ought to have recused himself is invalid, a nullity and must be reviewed. The exercise has accordingly been abortive and time wasting; the dance has not been worth the candle.
- 6.6 I must point to the duplicity in Kudenga's approach. In unrelated matters, Kudenga had difficulties with NSSA management even citing incompetence of the same. In all those, he approached me as the Board Chairman and all those issues were resolved. I set them out:
- i. In his capacity as Liquidator of Tetrad, Kudenga had certain properties which he wanted saved from disposal in June 2017 but which were eventually sold at an undervaluation as a result of what he perceived to be the incompetence of Mr Kurauone Chihota, an employee of NSSA and the second respondent's star witness in relation to the HCZ matter. I attach e-mail correspondence setting out those details below and mark it as annexure "H series". He asked that I intervene and resolve this issue. As it was despite Mr Kurauone Chihota's undertaking to save the properties and with more than a month in hand to do so, the properties were sold at an undervaluation to the distaste of Kudenga.
 - ii. On a separate occasion, Kudenga sought my intervention on a Tetrad/Interfin debt to NSSA which was secured by properties held by Pinnacle Holdings. Kudenga expressed serious reservations about the capacity of NSSA management to deal with this issue. I assisted and the authority gained USD\$16 million that had been previously written off as lost to failed banks. It is of course quite rich of him that he does not mention this episode which would alone obliterate any noted actual loss in the report.
- 6.7 The significance of these two happenings is that they follow a path, an approach, a *modus operandi* which the auditors purport to criticise and crucify me for in their report. They cannot blow hot and cold. Whilst that is however, clear, the crux of the matter is that the blowing hot and cold speaks to a compromised "mind" and constitutes reviewable circumstance.
- 6.8 In this regard I must also make the point that the report is designed to deal with certain targets, for certain unspecified oblique reasons. I wish to make reference to some happenings which took place during the period reviewed by the report and which concern third parties who were not condemned for what I have been condemned for.
- i. Minister Petronella Kagonye, against the resolution of both the NBS and NSSA boards, appointed Mr Lameck Danga as the Managing Director of NBS. Mr Danga had come second in the interviews held. The report neither criticizes nor condemns her for this appointment as it seeks to do with me. Surely it is a trite principle that like must be treated alike. What standard did the auditors apply which applies against me and not against my successors?

- ii. Further, it is common cause that Permanent Secretary Ngoni Masoka directed Danga's salary to be paid at a rate which was above those of his seniors in NSSA. I attach hereto and mark as "I series" correspondence dealing with that issue. If this is not unlawful and worthy of condemnation, why have I now been subjected to criticism?
- iii. Further, the report deals with what it calls the cost of unfair dismissals and mentions a figure of USD\$598 000-00. It conveniently does not mention that it was Minister Patrick Zhuwao who forced, NSSA, against a board resolution, to pay Mr Chikuni Mutiswa USD\$400 000-00. The impression however, given is that I must account for that entire globular sum. I attach in this regard documentary evidence that pertains to that issue and mark it the "J series"
- iv. In that same vein, the report does not make mention of the fact that Minister Petronella Kagonye forced the termination of the contract of employment of Mr David Makwara, now the reinstated and Acting General Manager of NSSA, on the dubious basis that he was too close to me. I attach the claim by Mr David Makwara against NSSA which was ultimately successful resulting in his reinstatement and mark it "K". The results of that indiscretion are carried in the sum against which the auditors complain and which they lay on my doorstep. The false impression is sought to be given that I am responsible for this loss. No attempt is made to identify the people who would otherwise be liable for these decisions and their attendant losses. No explanation is given as to why they are being shielded from either scrutiny or condemnation.
- v. I must also point out that the report makes no mention of the fact that Minister Petronella Kagonye forced NSSA to "sponsor" to the tune of USD\$200 000-00 a disability conference in her Caledonia Constituency and a further sum of USD\$200,000 to a school in Ruwa immediately prior to the July 2018 elections. Involved in this were then Minister Petronella Kagonye, then Permanent Secretary Ngoni Masoka and then Principal Director Simon Masanga, now the Permanent Secretary in the Ministry of Public Service, Labour and Social Welfare. This vote buying, done through pensioner's funds for private benefit is not mentioned. Is it because the auditors had a wider political audience to satisfy or otherwise to not offend?
- vi. The other issue that arises for consideration is that of board fees. The illegitimate point sought to be made by the report is that unlawful board fees were paid at my instance. The facts reviewed by the auditors shows that those fees were approved by the Permanent Secretary, Ngoni Masoka, and implemented by NSSA management. Despite the fact that I have never been a signatory to any NSSA agreement or bank account, Neither NSSA management or the Permanent Secretary are saddled with the consequences of this decision, whether it be correct or incorrect. There is however, a malicious attempt to place these issues at my doorstep.
- vii. There are also issues in the NSSA report that relate to a period before my appointment at NSSA. In particular the "overpayment" on MetBank debt swap and the purchase of properties from MetBank at "overstated" prices. There is zero attempt by the auditors to make clear I could not have been party to the same transactions that occurred prior to my arrival at NSSA. This, with respect, is another brazen attempt by the auditors to associate me with all alleged questionable transactions exposing their deep- seated bias against my person.

6.9 I contend that the auditors were biased against me. I contend that the bias contaminated their approach to the issues and has affected their conclusions. A report produced under such circumstances and affected by this kind of ill can have no legal validity. I submit that this report must be reviewed and set aside.

(v) **Inaccurate report**

7.1 I have already related to some factual inaccuracies that affect the report. This is a major feature of this report. The reason there are such inaccuracies is that the investigators did not consider my rebuttal. They ought to have weighed the allegations on the one hand and the responses on the other and thereafter come up with a conclusion.

7.2 There are however, further inaccuracies that afflict the report that I would like to relate to.

i. The report refers to a meeting that took place at my offices. I have previously explained why the meeting took place on that day at my offices. Deliberately and most dishonestly, the auditors misstate both the numbers of the people who attended the meeting and its business. The auditors refuse to acknowledge, despite there being minutes that the then NSSA General Manager (Ms Liz Chitiga), the NSSA Chief Finance Officer (Mr Emmerson Mungwariri), the NSSA Chief Investment Officer (Mr Herbert Hungwe), the NSSA Chief Properties Investment Officer (Mr Kurauone Chihota), NSSA Board member and ministry representative, Mrs Memory Mukondomi, and, amongst others, Mrs Precious Sibiya who is from the ministry's legal department where all in attendance. A smaller list is given by the auditors to create a false impression that this meeting was pregnant with impropriety. Further and for the avoidance of doubt, contrary to what the auditors surmise in their report, no decisions were made at this meeting. I challenge the second respondent to prove otherwise. To the contrary minutes included in the dossiers provided to them show the formal meetings held and timing at which decisions were made.

ii. Further, it is claimed in the report that a decision was taken at that meeting. This is patently false. There are minutes of that meeting. There are further minutes which show that a decision was only taken at a later stage by the board. Where did the auditors get this suggestion that a decision was taken at that meeting? The only answer is that this is their creation. Instead of reviewing facts, the auditors were busy creating them.

iii. The report also propounds the theory that there were investments undertaken without board approval. This inaccurate conclusion does not take into account a board resolution made before my time, in September 2012 authorising management to implement decisions of the Board Investment Committee. A screenshot of this Board resolution was provided to the auditors, and ignored. NSSA would also have been able to furnish them with the same.

7.3 The report is clearly and for those reasons inaccurate. It cannot be a report properly produced in terms of statute. Critically, no valid decisions and or courses of action be they legal or otherwise can be made to depend on that report.

(vi) **Inconsistency in approach**

- 7.4 A critical attribute of a forensic investigation is that it must be consistent. Consistent in its approach, consistent in its methods and consistent in its conclusions. This report is not consistent.
- 7.5 In dealing with the HCZ issue, the auditors report that NSSA was caused in one instance a loss of USD\$16 million, in another USD\$104 million and yet in another instance USD\$304 million. This lack of consistency is legendary. It speaks to a lack of standard on which the work was measured and conduct reviewed. The inconsistency is also a sign of delinquency and incompetence on the part of the auditors.
- 7.6 The auditors also fail to recognise, accept and or acknowledge the fact that the USD\$16 million disbursed by NSSA to HCZ was 3 times secured by a USD\$16 million Zimnat Insurance Guarantee and a USD\$32 million land bond. The omission to deal with that issue is deliberate and speaks to a malicious design.

(vii) **A malicious agenda**

- 7.7 I have already related to the malice that permeates and pervades the whole report. I submit that the malice discredits the report to the extent of rendering it reviewable. I however, deal with other instances in which this vice rears its head.
- 7.8 I turn to the issue of offtake agreements. I attach hereto and mark as the “**L** series” the documentation on these issues. I observe as follows:
- i. Offtake was conceived, designed and implemented by management. The issue was then discussed with ministry representatives who were in favour of the suggested course, the thinking being that this investment opportunity, was of national interest and import, and would also serve to assist the country in developmental terms.
 - ii. On its part, NSSA had employed Mr Charles Nyika, a senior executive specialising in State Procurement Board procurement whose sole duty was to ensure compliance with procurement regulations and requirements. He attended all the meetings, raised no red flag and never noted any disaffection.
 - iii. The minutes attached hereto and marked as “**M** series” show that the board took the position that offtake agreements did not require the State Procurement Board .
- 7.9 With this context in place, it cannot be contended, let alone suggested that I pushed for these projects without tender approval. It is malicious in the extreme for the auditors to make that allegation. It is, I suggest, ever so beneath them.
- i. In this regard I also deal with the authority given to MetBank to utilise USD\$37.75 million of NSSA Treasury Bills they held in their custody. The authority was granted in the name of the then General Manager, Ms Liz Chitiga, and unbeknown to her signed for by her Executive Assistant, Mr James Chiuta (Chiuta). Chiuta had no approval from the General Manager to sign off any document in her name and no board approval. Infact, Ms Chitiga, was available on the day in question to sign the said authority in person if warranted. Even after the fact, its existence, was never relayed to Ms Chitiga and/ or myself. For reasons that will never be stated, the auditors blame me for that issue. They blame me for an issue which by definition had nothing to do with me. They

did not even attempt to get corroboration from Ms Chitiga but instead make the bland statement based on, a naturally concerned Mr Chiuta, that he was instructed to fraudulently sign off a letter in the name of Ms Chitiga by me. The auditors don't enquire as to if I really wanted a letter signed, why I would not instruct Ms Chitiga, my subordinate, myself to do so or indeed as her superior, maybe sign the letter myself.

The same Chiuta, attempted on 22 February 2019 to have me sign a resolution dated 24 July 2017 that I had no recollection of. I politely declined to do so. I attach the email from his personal email address as Annexure "L" hereto.

- ii. Nothing, I dare suggest, nothing outside malice can account for this strange attitude.
 - iii. At any rate, NSSA had the Reserve Bank of Zimbabwe clearance on good standing of MetBank when all these transactions were concluded. Is it suggested that such good standing was improperly granted or that it should have been questioned?
 - iv. I attach hereto and mark as "N" the RBZ letter on the basis upon which NSSA carried out transactions with Metbank. What the auditors is now saying is that we should have ignored a valid and public position taken by the RBZ and instead taken the view of junior employees with the NSSA structure.
 - v. Nothing, I dare suggest, nothing outside malice can account for this strange attitude.
- 8.1 For all these reasons, the report cannot stand and must be set aside.

(viii) **Issues that have nothing to do with me**

8.2 I was appointed to head the NSSA board on the 12th of July 2015. The report covers the period 1 January 2015. The auditors in typical fashion however, assume that I was in office since the 1st of January 2015. For that reason, they irregularly assign to me transactions that happened before my time.

8.3 In that regard, I draw attention to the following;

- i. The report concludes that NSSA lost some USD\$4 million in a corrupt debt swap deal involving Metbank's property. I was not yet on the scene when that happened or is alleged to have happened.
- ii. It is also concluded that Metbank sold some properties to NSSA at highly inflated prices prejudicing the authority of some USD\$2 million. I had not been appointed as at the time of those allegations.

8.4 For reasons that are not clear, the auditors have decided to turn back the hands of time. This is irregular, this is malicious, this is unlawful. Indeed, this is reviewable.

(viii) **Conflict between Auditor General and the Accountants**

8.5 I have already made the point that second respondent carried out this audit as a delegate of the Auditor General. The Auditor General has however, and without raising questions, accepted findings that she clearly does not agree with and which are in conflict with her earlier work.

8.6 I relate in this regard to the calculated HCZ USD\$104 million potential liability. This is quite material and I contend that given its materiality, if this loss were even remotely real, the Auditor General would have flagged it in the 31 December 2018 results as a contingent liability and published it in her annual report as a matter of emphasis.

8.7 I submit that the reason this was not done is that second respondents' calculated loss is arbitrary, fictitious and is designed to cause alarm and despondency. This is a further taint that may not be got over.

(ix) **Other issues that do not relate to me**

8.8 I submit that there are many other shortcomings in the report which however, do not relate to me. Those shortcomings show the poor manner in which this task was handled and the mandate executed. I would for instance raise the Capital Bank issue and the flawed and amateurish modus followed by the auditors in that regard.

8.9 I point out however, that given that I cannot bear the torch on behalf of the multitudes, the attack that I launch to this report relates only to those areas that affect me and in which I am mentioned one way or the other. This will accordingly inform the relief that I seek.

(x) **Relief**

9.1 I therefore pray that the court may review this report and set it aside in those respects that pertain to me.

9.2 The report ought to be reviewed on the grounds that I have raised above.

9.3 The costs of this application ought to be borne by the second respondent. Those costs ought to be borne on the higher scale in view of the basic irregularities identified above, the malice that pervades the report and the complete and fundamental abdication of duty that has been showcased.

(xi) **Conclusion**

9.4 In the premises, I pray for an order in terms of the draft attached hereto.

THUS DONE AND SWORN TO AT JOHANNESBURG THIS ____ DAY OF AUGUST 2019

SIGNED

ROBIN VELA

BEFORE ME

NOTARY PUBLIC

IN THE HIGH COURT OF ZIMBABWE

CASE NO HC ____/19

HELD AT HARARE

In the matter between:

ROBIN VELA

APPLICANT

And

THE AUDITOR GENERAL OF ZIMBABWE N.O

1ST RESPONDENT

And

BDO ZIMBABWE CHARTERED ACCOUNTANTS

2ND RESPONDENT

(a firm of Accountants whose partners are Ngoni Kudenga, Gladman Sabarauta, Martin Makaya, Gilbert Gwatiringa, and Jonas Jonga)

draft order

Harare, the of 2019

Before the Honourable Mr(s) Justice _____

Advocate T. Mpofo with A. Rubaya for the Applicant

_____ for the Respondent

WHEREUPON after reading documents filed of record and hearing Counsel

IT IS ORDERED THAT:

- 1 The Forensic Audit of the National Social Security Authority for the period 1 January 2015 to 28 February 2018 produced on behalf of the Auditor General of Zimbabwe by BDO Chartered Accountants be reviewed and set aside in all those instances that pertain whether directly and or indirectly to the applicant.
- 2 Costs of suit shall be borne by the second respondent on the higher scale of legal practitioner and own client.

BY THE JUDGE

IN THE HIGH COURT OF ZIMBABWE

CASE NO HC _____/19

HELD AT HARARE

In the matter between:

ROBIN VELA

APPLICANT

And

THE AUDITOR GENERAL OF ZIMBABWE N.O

1ST RESPONDENT

And

BDO ZIMBABWE CHARTERED ACCOUNTANTS

2ND RESPONDENT

(a firm of Accountants whose partners are Ngoni Kudenga, Gladman Sabarauta, Martin Makaya, Gilbert Gwatiringa, and Jonas Jonga)

court application for review

TAKE NOTICE that Applicant intends to apply to the High Court sitting at Harare for an order in terms of the draft annexed to this notice on the grounds set out in the founding affidavit and supporting documents. The grounds upon which this application is made are the following;

- 1 Acting as a delegate of the first respondent, second respondent conducted a Forensic Investigation of the affairs of the National Social Security Authority.
- 2 In conducting that investigation, second respondent committed many reviewable irregularities which have now been fully set out in the founding affidavit.
- 3 Applicant seeks the review of second respondent's processes and conclusions in view of those irregularities.

If you intend to oppose the relief sought you should file and serve on the applicants a Notice of Opposition together with one or more affidavits within ten days of service upon you of this application. If you do not oppose the application, the matter will be dealt with as an unopposed application to your possible detriment.

DATED AT HARARE THIS ___ DAY OF AUGUST 2019

RUBAYA & CHATAMBUDZA

Applicant's Legal Practitioners

57 Churchill Avenue, Alexandra Park

HARARE (Mr Rubaya)

TO THE REGISTRAR

High Court of Zimbabwe

HARARE